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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

ABANTE ROOTER AND PLUMBING, INC.,
GEORGE ROSS MANESIOTIS, MARK
HANKINS, and PHILIP J. CHARVAT,
individually and on behalf of all others similarly
situated,

Plaintiffs,

v.

ALARM.COM INCORPORATED, and
ALARM.COM HOLDINGS, INC.,

Defendants.

Civil Action No. 4:15-cv-06314-YGR

**DEFENDANTS' RESPONSE IN
OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

DATE: April 25, 2017

TIME: 2:00 p.m.

LOCATION: Courtroom 1 – 4th Floor

JUDGE: Honorable Yvonne Gonzalez
Rogers

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I. INTRODUCTION

More than 6,000 companies sell residential and commercial security systems that include software and technology solutions developed by Defendant Alarm.com Incorporated (hereinafter, together with its parent company, Alarm.com Holdings, Inc., “Alarm.com”). Plaintiffs here bring a putative class action seeking to hold Alarm.com vicariously liable for damages potentially running into the billions of dollars for telephone calls made by one of these 6,000+ companies (“Dealers” or “Service Providers”). Alarm.com maintains that Plaintiffs are grossly overreaching and that the applicable law and facts dictate that Alarm.com can have no liability for the actions of a Dealer whom Alarm.com does not, and cannot, control. But that is not the issue to be decided today. Plaintiffs’ lengthy exposition and mischaracterization of extraneous facts not relevant at this stage of the proceedings notwithstanding (many of which are, in any event, not properly supported by citations to the record), the question for the Court’s resolution is whether the classes Plaintiffs propose to represent can properly be certified. They cannot.

To begin with—and fundamentally—individual issues predominate over common issues and thereby preclude class certification. Plaintiffs seek to hold Alarm.com vicariously liable for the telemarketing practices of Alliance Security, Inc. (“Alliance”)—one of the 6,000+ Dealers that sell security systems incorporating Alarm.com’s software. But even were one to assume that at least some of the telephone calls at issue were made by Alliance on behalf of Alarm.com (which Alliance itself disputes), certification would nevertheless be inappropriate because there exist no class-wide means in this instance by which to determine *which* of Alliance’s calls may have promoted Alarm.com’s technology. Accordingly, this individual question, the resolution of which would necessitate hundreds if not thousands of mini-trials, would by itself predominate over any common issues of law or fact shared by the putative class.

The same individual-by-individual analysis would be required to apportion liability between Alarm.com and the various entities Plaintiffs have sued for the same calls in the Monitronics MDL—a problem exacerbated by Plaintiffs’ earlier refusal to transfer this matter to

1 the Monitronics litigation. Two different courts are now hearing two separate cases in which
2 plaintiffs are seeking recovery from different defendants for the exact same purported
3 violations. Apportioning liability under these circumstances—circumstances occasioned by
4 Plaintiffs themselves due to their refusal to transfer this matter to the Monitronics MDL—will
5 necessitate individual inquiries by two different courts into the potential liability of each
6 defendant for each individual call. Individual issues predominate over common issues for this
7 reason as well.

8 The same is true given the existence of consent in the record. Numerous courts have
9 held that, where a defendant can present actual evidence of consent, and there are no class-wide
10 means to determine which class members provided consent and which class members did not,
11 certification is inappropriate. That is the case here also.

12 The unique facts of this case give rise to multiple individual questions that cannot be
13 resolved by class-wide means. Individual issues therefore predominate over common issues and
14 preclude certification. But predominance is not the only Rule 23 factor left unsatisfied; three
15 additional grounds lead to the same conclusion. First, given the existence of the parallel
16 litigation in the Monitronics MDL, a class action is not superior in this instance because of the
17 risk of inconsistent results and the potential for double recovery. Second, Plaintiffs' first two
18 proposed classes fail because Plaintiffs failed to submit expert reports establishing the
19 numerosity of these classes. Finally, Plaintiffs' third proposed class fails because the lead
20 Plaintiff for that class is not a member of the very class he seeks to represent.

21 Defendants are confident that, should this matter proceed, Plaintiffs' theory of
22 liability—attempting to hold a software company liable for the actions of one of the 6,000+
23 companies that sell alarm systems using its technology—will fail on summary judgment, just
24 like this theory already failed as to two defendants in the Monitronics MDL. *See In re*
25 *Monitronics Int'l, Inc.*, MDL No. 1:13-md-2493, 2016 U.S. Dist. LEXIS 177105 (N.D. W.Va.
26 Dec. 22, 2016)(granting summary judgment motions brought by UTC Fire & Security Americas
27 Corporation and Honeywell International based on lack of vicarious liability). But this case
28

1 need not, and should not, proceed that far. Class certification is inappropriate here and
 2 Plaintiffs' Motion should therefore be denied.

3 **II. ISSUE TO BE DECIDED**

4 Whether Plaintiffs have demonstrated that their proposed classes are subject to
 5 certification pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3).

6 **III. FACTUAL BACKGROUND**

7 **A. THE HOME ALARM INDUSTRY**

8 Dealers like Alliance sell, install and service their own fully-integrated security systems.
 9 Matthew Pitts Declaration ("Pitts Decl."), ¶ 8. To package and construct their systems, these
 10 Dealers contract with companies such as Honeywell, GE/Interlogix and United Technologies
 11 Corporation, among others (the "Hardware Manufacturers"), which manufacture the various
 12 hardware components: security panels, sensors, and related components. Anne Ferguson
 13 Declaration ("Ferguson Decl."), ¶ 6. Dealers also contract with technology companies like
 14 Alarm.com (referred to as "Software Providers"), which develop the necessary software to
 15 allow the various system components to communicate as part of an interactive security system.
 16 *Id.* Finally, Dealers enter into arrangements with monitoring companies or central stations,
 17 which monitor the alarm systems and contact emergency services when an alarm is triggered.
 18 *Id.*

19 **B. ALARM.COM**

20 Alarm.com is a technology company that offers cloud-based software-as-a-service
 21 ("SaaS") solutions for the interactive security and intelligent automation markets for residential
 22 and light commercial properties. Ferguson Decl., ¶ 3. In other words, Alarm.com develops the
 23 software that allows various alarm system components to communicate with each other. *Id.*

24 Alarm.com does not sell its software directly to end user customers. Ferguson Decl., ¶ 4
 25 Accordingly, Alarm.com has never placed a single phone call to any of the named Plaintiffs or
 26 any of the individuals comprising the putative classes. *Id.* Instead, Alarm.com sells its
 27 technology to approximately 6,000 different Dealers (of which Alliance is one). Ferguson Decl.,
 28

¶ 5. These Dealers, in turn, choose how to incorporate Alarm.com's security and automation software solutions into the integrated security systems that they then sell and install, with combinations and packages designed by each Dealer to address the needs of each specific customer. *Id.* When Dealers sell their fully-integrated security systems to end users, they do so on their own behalf—not on behalf of the Hardware Manufacturers or Software Providers. *Id.* Alliance has acknowledged as much:

The Defendant, Alarm.com, is the provider of one discrete component of Alliance's systems, and not of any product or service which is sold by Alliance as a commodity separate and apart from its own security systems. Alliance therefore does not use any vendors to generate leads for the Defendants but rather only uses vendors to generate leads for itself – in order to sell its own security systems, of which Defendant's product or service is merely an integrated component.

Exhibit 1¹, *Abante Rooter, et al. v. Alarm.com*, No. 16-mc-00020-S-PAS (D.R.I.), Alliance's Objection to Plaintiff's Motion to Compel, Dkt. 10, p.3.²

As a provider of one discrete component of an alarm system, Alarm.com controls neither the Dealers who purchase its software, nor their day-to-day marketing activities. Ex. 2, Steve Trundle Deposition ("Trundle Dep."), p. 77:3-24, pg. 78:1 (filed under seal); Ex. 3, Ferguson Dep., p. 36:24, p. 37:1. Alarm.com has no ability to monitor the marketing activities of the 6,000+ Dealers, with the exception of some Dealers that participate in the CLS Program (as described below). *Id.* Dealers market and sell a combination of Alarm.com and non-Alarm.com products through a variety of means and it would be impossible for Alarm.com to keep tabs on those activities, let alone attempt to control them. Ex. 2, Trundle Dep., p. 76:15-24, p. 77:1-24, pg. 78:1; Ex. 3, Ferguson Dep., p. 36:24, pg. 37:1. This type of dealer or reseller model is neither unique nor new. In fact, it is utilized in a host of other industries. Ferguson

¹ Unless otherwise noted, all exhibits are attached to the Declaration of Margaret Schuchardt.

² The Court may take judicial notice of court filings in other litigation. *See Carmax Auto Superstores Cal. LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1087 (C.D. Cal. 2015) ("Court orders and filings are proper subjects of judicial notice.").

Decl., ¶ 5. Plaintiffs' suggestion that Alarm.com should police the multitude of Dealers that sell its technology (as well as those Dealers' agents and sub-agents) is simply not feasible.

C. ALARM.COM'S CLS PROGRAM

Through the years, Alarm.com was from time to time contacted by consumers who wished to purchase security systems with Alarm.com's particular technology. Ex. 2, Trundle Dep., p. 28:1-24, p. 29:1-7. Because Alarm.com does not sell directly to end user consumers, Alarm.com generally passed on any such inquiries by informal means to one or more of the Dealers who incorporated Alarm.com technology into their security systems. *Id.* Eventually, Alarm.com added a feature to its website giving consumers the opportunity to request information from a local Dealer. Ex. 3, Ferguson Dep., p. 31:18-23, p. 32:19-24; p. 33:1-9. By way of this Customer Lead Service ("CLS"), consumers can now enter their contact information into Alarm.com's website and choose to be contacted by a number of local Dealers. *Id.*

Because the consumers in the CLS system have contacted Alarm.com and indicated that they are interested specifically in a security system with Alarm.com technology, Alarm.com has the incentive and ability to engage in some form of monitoring to ensure a positive experience for each customer. Ferguson Decl., ¶ 7. Accordingly, in addition to ensuring that such consumers have clearly expressed their desire to be contacted,³ Alarm.com provides support resources to participating CLS Service Providers and uses the CLS program to periodically audit how a participating Dealer is utilizing the program and how a Dealer is following up with

³ When submitting an inquiry through the Alarm.com site, consumers check a box to acknowledge their consent to be contacted by the Dealers they select:

By checking this box you authorize Alarm.com and/or Dealers to call you or send you text messages to the number you provided above using an automatic telephone dialing system or an artificial or prerecorded voice for marketing purposes. You are not required to agree as a condition of purchasing any property, goods, or services. Text messaging and data rates may apply.

https://www.alarm.com/get_started/finddealer_dealermatched.aspx?q=7A42FCCA6487ABE0B9D9BE46332DE5B0&f=2

1 a CLS lead. Ex. 3, Ferguson Dep., p. 38:2-10. But such audits are limited to calls made to leads
 2 obtained through the CLS programs—individuals who have expressed a specific interest in
 3 Alarm.com’s technology and services through Alarm.com’s website. *Id.*

4 Outside of the CLS program, Alarm.com does not have the ability to monitor the
 5 marketing activities of Dealers. Ex. 2, Trundle Dep., p. 77:3-24, p. 78:1; Ex. 3, Ferguson Dep.,
 6 p. 36:24, p. 37:1. Much like a brake pad manufacturer is neither able, nor expected, to control
 7 the behavior of every Toyota dealership, Alarm.com cannot feasibly control the actions of the
 8 thousands of Dealers that include its software in some of their products. Ex. 3, Ferguson Dep.,
 9 36:24, 37:1.

10 **D. PLAINTIFFS’ CLAIMS**

11 The three remaining lead Plaintiffs (the fourth withdrew his claim) have together
 12 brought nearly 100 TCPA cases. *See* Order Granting Stipulation of Dismissal Without Prejudice
 13 of George Ross Manesiotis (Dkt. 58); Ex. 4, PL-CHARVAT_000001-2; Ex. 5, Philip Charvat
 14 Deposition (“Charvat Dep.”), p. 79:1-10; Ex. 6, Fred Heidarpour Deposition Transcript
 15 (“Heidarpour Dep.”), p. 86:15-24. Here, they attempt to hold Alarm.com liable for the alleged
 16 conduct of one of the thousands of Dealers that sells security systems incorporating
 17 Alarm.com’s technology. As it turns out, however, while Plaintiffs argue in this litigation that
 18 Alarm.com should be held responsible for Alliance’s actions, in the Monitronics MDL
 19 Plaintiffs’ counsel (along with one of the named Plaintiffs in the instant litigation) brought
 20 claims against a number of other companies they claim are vicariously liable for the very same
 21 calls. *See* Ex. 7, *In re Monitronics Int’l, Inc.*, MDL No. 1:13-md-2493, Second Amended
 22 Master Consolidated Complaint; Ex. 8, Plaintiffs’ Third Supplemental Statement; Ex. 9,
 23 Plaintiffs’ Fifth Supplemental Statement; *see also* Ex. 10, PL-CHARVAT_000011; Ex. 5,
 24 Charvat Dep., pp. 222-232 (generally), 233:20-25, 234:1-8. Indeed, not only are the putative
 25 classes Plaintiffs seek to certify here completely subsumed within the class definitions in the
 26 Monitronics MDL, but Plaintiff Philip Charvat conceded at his deposition that he is seeking *full*
 27 *recovery* from Alarm.com in this case for the very calls he claims were made on behalf of other
 28

1 entities in the Monitronics MDL. Ex. 5, Charvat Dep., p. 77:1-24; p. 209: 15-24. Under these
2 circumstances, class certification is inappropriate.

3 **IV. LEGAL STANDARD**

4 A class action is “an exception to the usual rule that litigation is conducted by and on
5 behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338,
6 348, 131 S.Ct. 2541, 2550 (2011). Accordingly, while the Court retains broad discretion to
7 certify a class, because representative actions are the exception and not the norm, the Court
8 must conduct a “rigorous analysis” to determine whether the plaintiff has established the
9 requirements of Rule 23 to ensure that a departure from the general rule of individual litigation
10 is justified. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 160-61, 102 S. Ct. 2364,
11 2372 (1982). The party seeking class certification bears the burden of demonstrating its
12 compliance with Rule 23. *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. at 2551 (“A party seeking class
13 certification must affirmatively demonstrate his compliance with the Rule—that is, he must be
14 prepared to prove that there are in fact sufficiently numerous parties, common questions of law
15 or fact, etc.”).

16 **V. ARGUMENT**

17 The fundamental problem with class treatment in the instant case is that individual
18 issues predominate over any common ones; there is no way to determine from the available
19 data, on a class-wide basis, which of the individual calls at issue promoted Alarm.com’s goods
20 or services and which did not. Put simply, Alliance sells integrated security systems comprised
21 of any number of branded hardware and software components combined or packaged to meet
22 Alliance’s customers’ needs. But Alliance does not market those individual components.
23 Instead, Alliance markets its own product—the integrated security system—and, accordingly,
24 Alliance’s telemarketing is made on its own behalf to promote its own products. Alarm.com
25 cannot be held vicariously liable for calls not made on its behalf. *See, e.g., Thomas v. Taco Bell*
26 *Corp.*, 582 Fed. Appx. 678, 679-680 (9th Cir. 2014)(affirming grant of summary judgment for
27 defendant on grounds that defendant was not directly or vicariously liable for the alleged calls
28

1 at issue); *In re Monitronics Int'l, Inc.*, 2016 U.S. Dist. LEXIS 177105 at *19-42 (rejecting
2 similar vicarious liability arguments to those made by Plaintiffs here); *Makaron v. GE Sec. Mfg.*,
3 No. 14-cv-1274, 2015 U.S. Dist. LEXIS 75240, *15-28, (C.D. Cal. May 18, 2015)(analyzing
4 whether security manufacturer could be liable under the FCC's vicarious liability standards and
5 granting manufacturer's motion for summary judgment).

6 Recognizing this, Plaintiffs limit their class definitions to individuals and entities that
7 received calls "promoting [Alarm.com's] goods or services." Motion, p. 12. But, in this
8 instance, there are no class-wide means to determine which calls were made for such a purpose.
9 Indeed, in the Monitronics MDL, Plaintiff Charvat has alleged that the very same calls at issue
10 here were made by Alliance on behalf of companies other than Alarm.com. Ex. 5, Charvat
11 Dep., p. 234:8.

12 The Monitronics MDL, in fact, underscores the myriad complex, individualized issues
13 presented by Plaintiffs' claims here. The Monitronics plaintiffs allege that Alliance made
14 telemarketing calls on behalf of several other companies; the Plaintiffs here allege that Alliance
15 made those very same calls on behalf of Alarm.com. See Ex. 7, Second Amended Master
16 Consolidated Complaint. In each litigation, the respective Courts will need to determine which
17 calls were made on behalf of which provider and, if more than one defendant is liable for the
18 calls, the extent of each defendant's liability. Neither here, nor in the Monitronics MDL, have
19 the putative class plaintiffs explained how these determinations can be made by class-wide
20 means. The simple answer is that they cannot.

21 Setting aside the issue of the potential liability of other parties, another individualized
22 issue presents itself here: consent. Even were one to assume that Alliance made calls promoting
23 Alarm.com's technology, Plaintiffs' proposed classes would fail because certain of the call
24 recipients provided consent to be contacted and therefore can have no claim. In this instance,
25 however, there are no class-wide means to determine who those individuals are. Thus,
26 individualized issues of consent predominate over common issues and class certification is
27 inappropriate.
28

1 The above-noted issues also cause Plaintiffs' proposed classes to fail on superiority
 2 grounds. Class treatment is not superior in this instance because the existence of parallel but
 3 separate litigation involving the very same calls precludes certification pursuant to Federal Rule
 4 of Civil Procedure 23(b)(3)(B), (C) and (D).

5 Predominance and superiority, however, are not the only Rule 23 factors unsatisfied by
 6 Plaintiffs' proposed class definitions. Plaintiffs have also failed to identify the members of their
 7 proposed Cell Phone Class and Residential Class and have proposed a lead Plaintiff for the
 8 National Do-Not-Call Class ("DNC Class") who is an inadequate class representative. For all of
 9 these reasons, Plaintiffs have not established that all of the applicable requirements of Rule 23
 10 have been met, and certification should be denied.

11 **A. INDIVIDUAL ISSUES PREDOMINATE OVER COMMON ISSUES AND PRECLUDE**
 12 **CERTIFICATION**

13 To certify a class under Rule 23(b)(3), as Plaintiffs propose, they must establish that
 14 "questions of law or fact common to class members *predominate* over any questions affecting
 15 only individual members. . . ." Fed. R. Civ. P. 23(b)(3)(emphasis added). In determining
 16 whether common issues predominate, the Court must first identify the substantive issues related
 17 to Plaintiffs' claims; then consider the proof necessary to establish each element of the claim or
 18 defense; and consider how these issues would be tried. *See* Cal. Prac. Guide Fed. Civ. Pro.
 19 Before Trial Ch. 10-C § 10:412 (*citing Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S.
 20 804, 809, 131 S.Ct. 2179, 2184 (2011)). "Where, after adjudication of the class-wide issues,
 21 plaintiffs must still introduce a great deal of individualized proof or argue a number of
 22 individualized legal points to establish most or all of the elements of their individual claims,
 23 such claims are not suitable for class certification under Rule 23(b)(3)." *Klay v. Humana, Inc.*,
 24 382 F.3d 1241, 1255 (11th Cir. 2004); *Faulk v. Sears Roebuck & Co.*, 2013 U.S. Dist. LEXIS
 25 57430, *15-17 (N.D. Cal. April 19, 2013)(opinion of this Court quoting same). In the present
 26 case, there exist significant individual issues that cannot be adjudicated by class-wide means.
 27 Certification is, therefore, inappropriate.
 28

1 **1. THERE ARE NO CLASS-WIDE MEANS BY WHICH TO DETERMINE WHICH CALLS, IF**
2 **ANY, WERE PLACED FOR PURPOSES OF “PROMOTING ALARM.COM’S GOODS OR**
3 **SERVICES”**

4 Plaintiffs maintain that Alarm.com should be held liable for all of the calls placed by
5 Alliance because the calls were made to promote Alarm.com’s goods or services. Plaintiffs are
6 wrong. Alliance maintains that it does not make outbound calls on behalf of Alarm.com—it
7 makes outbound calls for itself. Pitts Decl., ¶ 5. This makes sense. After all, Alliance is one of
8 more than 6,000 Dealers that sell security systems that include Alarm.com software as a
9 discrete component of a fully-integrated security system. Ferguson Decl., ¶ 5. These Dealers
10 sell their own security systems (consisting of numerous hardware, software and monitoring
11 components and services). *Id.* at ¶ 6. That being the case, none of the calls at issue here were
12 made on behalf of Alarm.com and, as a result, Alarm.com can have no liability here.

13 But even if Plaintiffs could demonstrate that *some* of the calls were made to promote
14 Alarm.com’s goods or services, certification would nevertheless be inappropriate because it is
15 evident that not *all* of the calls promoted Alarm.com’s technology.

16 To begin with, a significant number of the calls placed by Alliance resulted in
17 installations of security systems *with no Alarm.com components*. In his declaration, Matthew
18 Pitts, Alliance’s director of legal compliance, explained that numerous sales that were
19 precipitated by Alliance’s telephone calls resulted in installations of landline-based security
20 systems that included no Alarm.com software. Pitts Decl., ¶ 9. Moreover, numerous additional
21 calls would have been placed to individuals who, although they did not purchase a security
22 system, would have in any event been limited to choosing a landline-based system that could
23 not have included any of Alarm.com’s cellular or wireless technology. *Id.* In other words, many
24 of the calls placed by Alliance did not result, and could not have resulted, in any benefit to
25 Alarm.com. Given that Alarm.com provides only one discrete component of a security system,
26 this is not surprising, but it underscores that Alliance was placing calls for itself—not for
27 Alarm.com. *Id.* at ¶ 5.

1 Second, Alliance testified that Alarm.com would not generally have been mentioned by
2 name on the calls at issue—a fact that is supported by the call scripts produced by Alliance in
3 response to Plaintiffs’ subpoena, none of which reference Alarm.com. Pitts Decl., ¶ 10. In fact,
4 Alliance maintains that, not only was Alarm.com not mentioned by name, but in the majority of
5 instances even the type of technology provided by Alarm.com would not have been mentioned.
6 *Id.* at ¶ 11. The exceptions would have generally been limited to instances where individuals
7 interested in a security system specifically asked about the providers or manufacturers of the
8 various system components, or if the conversations otherwise proceeded into unscripted
9 discussions. *Id.* at ¶ 10. Relevant case law demonstrates that this point is critical. *See Makaron*,
10 2015 U.S. Dist. LEXIS 75240 at *22. In *Makaron*, for instance, the court found that the call at
11 issue in that case included no statement that the caller was “a representative or agent of the
12 Defendant, or any other language that would lead the listener to reasonably believe that the
13 caller was acting on behalf of the Defendant.” *Id.* Accordingly, the *Makaron* court granted
14 summary judgment for the defendant. *Id.* at *28. Here, the same issue will present itself as to
15 each individual class members, and the court and the parties will need to delve into the facts of
16 each alleged call to determine whether Alarm.com was mentioned or whether the caller
17 otherwise led each putative class member to believe that the call was placed on behalf of
18 Alarm.com. There are no class-wide means to accomplish this analysis—mini-trials will
19 become necessary.

20 Third, the lead Plaintiffs themselves have confirmed Alliance’s position. Mr. Hankins
21 testified that he and/or his counsel excluded from this litigation security system-related
22 telephone calls that did not mention Alarm.com because, in his view, they are not “germane.”
23 Ex. 11, Mark Hankins Deposition (“Hankins Dep.”), p. 147:8-20. Moreover, while Plaintiff
24 Abante maintains that Alarm.com was mentioned on the call Abante allegedly received from
25 Alliance, Plaintiffs Charvat and Hankins both conceded at their depositions that the individuals
26 who allegedly telephoned them did not mention Alarm.com until Plaintiffs first specifically
27 asked about the company (although two Hardware Manufacturers, GE and 2GIG, were
28

1 apparently mentioned without prompting). *See* Complaint, Dkt. 1, pp. 11-12; Ex. 11, Hankins
 2 Dep., p. 124:8-25, p. 125: 1-20, p. 131:6-17; Ex. 5, Charvat Dep., p. 152:16-18. In fact, Mr.
 3 Charvat noted that Alarm.com was not mentioned until his *sixth* call with Alliance—and then,
 4 only in response to his direct question. Ex. 5, Charvat Dep., pp. 176:24, p. 177:1-14.

5 Accordingly, even were one to assume that some of the calls at issue were placed by
 6 Alliance in order to promote Alarm.com’s goods and services (which both Alliance and
 7 Alarm.com maintain is not the case), the record evidence demonstrates that not all of the calls
 8 could have promoted Alarm.com as the company was not mentioned on the vast majority of the
 9 calls, and a significant number of the calls resulted in purchases and installations of security
 10 systems that did not include—and could not have included—any Alarm.com components.
 11 Under these circumstances, the only way to determine whether a call was made to promote
 12 Alarm.com’s goods and services—thereby rendering the recipient a member of the class—
 13 would be to investigate the particular circumstances and content of each particular call. There
 14 are no class-wide means of doing so because there is no way to determine from the data itself
 15 whether any of the calls were made on behalf of Alarm.com—a fact that Plaintiffs’ expert,
 16 Anya Verkhovskaya, concedes. Ex. 12, Anya Verkhovskaya Deposition (“Verkhovshaya
 17 Dep.”), pp. 62:12-25, 63:1-3. Accordingly, individual issues predominate over common issues
 18 and class certification should be denied.

19 **2. THERE ARE NO CLASS-WIDE MEANS TO DETERMINE WHICH ENTITIES ARE**
 20 **LIABLE FOR EACH ALLEGED CALL**

21 Plaintiffs here seek to hold Alarm.com liable for marketing calls made by Alliance for the
 22 full amount of damages per call available under the TCPA. *See* Complaint (Dkt. 1); Ex. 5,
 23 Charvat Dep., p. 209:11-19. But Plaintiffs fail to mention that at least one of the named
 24 Plaintiffs here is also seeking to hold other companies liable for the very same calls in the
 25 Monitronics MDL. Indeed, the classes Plaintiffs seek to certify in this litigation are subsumed in
 26 their entirety by the putative classes in the Monitronics MDL. Whatever other difficulties the
 27 overlapping classes may present in this action down the road, for purposes of certification, the
 28

1 existence of parallel litigation raises issues that must be resolved on an individualized basis,
 2 specifically: on which entities' behalf was Alliance making calls? What "goods and services"
 3 were being promoted? If more than one entity is liable, how should that liability be
 4 apportioned? Since not every call made by Alliance marketed or even discussed every potential
 5 component of every system Alliance sells, there is no method by which the Court can answer
 6 these questions short of summoning each of the individual call recipients into court for the
 7 purpose of conducting mini-trials to determine which entities' products were promoted in each
 8 individual call. *See Makaron*, 2015 U.S. Dist. LEXIS 75240 at *22-*23.

9 In the Monitronics MDL, a number of class plaintiffs (including Plaintiff Charvat) assert
 10 that Alliance made telemarketing calls on behalf of Honeywell, ISI Alarms, and Monitronics.
 11 Specifically, the plaintiffs seek recovery for "illegal telemarketing calls on a residential or
 12 cellular telephone line, from or on behalf of the Defendants indicated, who are liable either
 13 under theories of direct liability (as in the case of Defendants VMS/Alliance and ISI Alarms) or
 14 vicarious liability (as in the case of Defendants Monitronics, UTC, and Honeywell, whose
 15 authorized dealers placed the illegal telemarketing calls)." Ex. 7, *In re Monitronics*, Second
 16 Amended Master Consolidated Complaint, Dkt. 355, ¶ 38. In particular, Plaintiff Charvat seeks
 17 to serve as a representative of the following class:

18 ***The UTC-Monitronics-Alliance Class:*** All persons or entities within the United
 19 States who received, on or after May 18, 2007, a non-emergency telephone call
 20 (excluding TSS Survey Class calls) from or on behalf of UTC, Monitronics, or
 VMS/Alliance, promoting goods or services:

21 (i) to a cellular telephone number through the use of an automatic telephone
 22 dialing system or an artificial or prerecorded voice; or

23 (ii) to a residential telephone number through the use of an artificial or
 24 prerecorded voice; or

25 (iii) to a cellular or residential telephone number registered on the national
 26 Do Not Call Registry and who received more than one such call within any
 twelve-month period.

27 *Id.*, ¶ 116(a).
 28

1 This class encompasses entirely the classes Plaintiffs seek to represent here, which are
2 defined in Plaintiffs' Motion as follows:

3 **Cell Phone Class (Plaintiff Abante Rooter & Plumbing, Inc.):** All persons in the
4 United States to whom: (a) Alliance or its agents, on Defendants' behalf, instituted
5 one or more non-emergency telephone calls; (b) promoting Defendants' goods or
6 services; (c) to a recipient's cellular telephone number; (d) through the use of an
automatic telephone dialing system or an artificial or prerecorded voice; (e) at any
time since October 15, 2013.

7 **Residential Class (Plaintiff Hankins):** All persons in the United States to whom:
8 (a) Alliance or its agents, on Defendants' behalf, initiated one or more non-
9 emergency telephone calls; (b) promoting Defendants' goods or services; (c) to a
recipient's residential telephone line; (d) through the use of an artificial or
prerecorded voice; (e) at any time since October 15, 2013.

10 **National Do-Not-Call Class (Plaintiff Charvat):** All persons in the United States
11 who: (a) received more than one call, made by Alliance on Defendants' behalf; (b)
12 promoting Defendants' goods or services; (c) in a twelve-month period; (d) on their
cellular telephone line or residential telephone line; (e) whose cellular or residential
13 telephone line number(s) appear on the National Do-Not-Call Registry; (f) at any
time since December 30, 2011.

14 Motion, pp. 12-13. In sum, any individuals who meet the class definition in the present case
15 necessarily fall within the Monitronics MDL class as well.

16 This could have been avoided. On March 24, 2016, Defendants filed a motion seeking to
17 transfer this litigation to the Monitronics MDL. Plaintiffs, however, resisted, arguing as follows:

18 The central common issue that must be resolved in the Abante action is whether
19 Defendants are directly or vicariously liable for calls placed on Defendants' behalf.
20 This question is wholly distinct from the central common issue raised in the
Monitronics litigation, which is whether Monitronics, UTCFSA, and Honeywell
21 are vicariously liable for calls placed on their behalf.

22 Ex. 13, *In re Monitronics*, MDL No. 1:13-md-2493 (N.D. W. Va.), Memorandum in Opposition
23 to Alarm.com Motion to Transfer and Consolidate Potential Tag-Along Action. The above
24 statement appears to imply that the calls allegedly placed on behalf of Alarm.com are different
25 than the calls allegedly placed on behalf of Monitronics, UTCFSA and Honeywell. But, as
26 Plaintiff Charvat has now conceded, they are not. They are the same calls. Ex. 5, Charvat Dep.,
27
28

pp. 233:20-25, 234:1-8. As a consequence, the calls at issue in this case are now entirely subsumed by the class in the Monitronics MDL.

This overlap injects individual issues into this litigation that cannot be resolved by class-wide means. In particular, to the extent any of the calls at issue are determined to have been placed by Alliance to “promote” Alarm.com’s technology, the Court will need to determine how to apportion liability between Alarm.com and the other potentially responsible parties against whom Plaintiffs have brought claims for the very same calls in a different litigation. This analysis will need to take place on a call-by-call basis, as each call may have been made to “promote” a different combination of the defendants against whom Plaintiffs have brought claims in this case and in the Monitronics MDL. There are no class-wide means that would simplify this analysis. For this reason, individual issues predominate over common issues and preclude certification.

3. INDIVIDUAL ISSUES OF CONSENT PREDOMINATE OVER COMMON ISSUES

Where, as here, the record indicates that some class members consented to be contacted, but it is not possible to determine by class-wide means who did and who did not consent, class certification is inappropriate.

The seminal case on this issue is *Gene & Gene LLC v. BioPay, LLC*, 541 F.3d 318, 327-329 (5th Cir. 2008), where the Fifth Circuit held that certification was inappropriate in a TCPA case when the evidence showed that some of the faxes at issue were solicited by the recipients, but determining exactly which ones were solicited could only be decided on a case-by-case basis. The court noted that the plaintiff “failed to advance a viable theory of generalized proof to identify those persons, if any, to whom [the defendant] may be liable under the TCPA.” *Id.* at 329. See also *True Health Chiropractic, Inc. v. McKesson Corp.*, No. 13-cv-02219, 2016 U.S. Dist. LEXIS 111657, *9-17 (N.D. Cal. Aug. 22, 2016)(finding Defendants presented sufficient evidence to establish that the court would need to make detailed factual inquiries regarding whether each putative class member granted prior express permission); *Sherman v. Yahoo! Inc.*, 13-cv-0041, 2015 U.S. Dist. LEXIS 127809, *32-*36 (S.D. Cal. Sept. 23, 2015)(declining to

1 certify class where the defendant had set forth several plausible consent theories that applied
 2 differently to different class members and plaintiff failed to show that any theory of generalized
 3 proof overcame the need for individualized determinations); *Fields v. Mobile Messengers Am.,*
 4 *Inc.*, No. 12-cv-05160, 2013 U.S. Dist. LEXIS 163950, *8-15 (N.D. Cal. Nov. 18, 2013)(same);
 5 *Jamison v. First Credit Servs., Inc.*, 290 F.R.D. 92, 106-107 (N.D. Ill. 2013) (same); *Conrad v.*
 6 *GMAC*, 283 F.R.D. 326, 329-330 (N.D. Tex. 2012) (same; also noting that putative class
 7 members may argue that they never consented despite records to the contrary, creating even
 8 more individualized issues).

9 Here, there is no dispute that certain of the recipients of the Alliance calls at issue
 10 consented to receive those calls—both Alarm.com and Alliance produced voluminous evidence
 11 of consent. *See* Pitts Decl., ¶ 6; Angeleen Rohda Declaration (“Rohda Decl.”), ¶ 4; Ex. 14,
 12 Alarm 0018581-83 (three Excel spreadsheets filed under seal on CD-Rom); *see also* Ex. 15,
 13 Alarm 0018577-80. The problem is determining which calls those were. Plaintiffs posit that
 14 class members who provided consent can readily be identified from Alarm.com's records and
 15 removed. Plaintiffs are incorrect. While the CLS consent data that Alarm.com produced does, in
 16 fact, consist in significant part of individuals who provided proper consent to be contacted and
 17 can therefore claim no TCPA violation, it also includes individuals who contacted Alarm.com
 18 and whose information was then manually entered into the CLS system by Alarm.com
 19 employees. Rohda Decl., ¶ 4. Some of those individuals may have valid claims at this point,
 20 but the data provides no means of determining who they are.

21 For instance, pursuant to the FCC’s regulations applicable to the TCPA, an entity is
 22 permitted to contact an individual who has registered her name on the national do-not-call
 23 registry (“DNC”) for up to three months after that individual has contacted the entity to inquire
 24 about its services. 47 C.F.R. §64.1200(c), (f)(5), (f)(14). Alarm.com would have such an
 25 established business relationship (“EBR”) for a three-month period with the individuals who
 26 contacted Alarm.com and were then manually added to the CLS list. If those individuals
 27 subsequently made a purchase, the EBR would be extended to eighteen (18) months. *Id.* The
 28

1 problem here is that there are no class-wide means to determine which individuals on
2 Alarm.com's CLS list: (1) provided consent (and can therefore have no claim); (2) had either a
3 3-month or 18-month EBR with Alarm.com and were called during that time frame (and can
4 therefore have no claim); or (3) had either a 3-month or 18-month EBR with Alarm.com but
5 were called outside the applicable time frame (and may therefore have a valid claim).

6 Plaintiffs offer no class-wide means of separating individuals who were called after
7 having provided consent or during the pendency of a valid EBR from those who were called
8 after the EBR had expired. In fact, there is no class-wide means of doing so. Short of
9 summoning each of these individuals into court to hold a multitude of mini-hearings, there is no
10 way to determine which individuals provided consent, which individuals had an EBR with
11 Alarm.com, and which individuals were contacted during the pendency of that EBR. The
12 existence of consent and EBR is therefore another individualized issue that predominates over
13 common issues.

14 **B. PLAINTIFFS HAVE FAILED TO ESTABLISH SUPERIORITY, NUMEROSITY, AND ADEQUACY**
15 **OF REPRESENTATION**

16 The predominance of individual issues is sufficient to defeat certification here, but it is
17 not the only reason Plaintiffs' motion fails.

18 First, the existence of the parallel litigation in the Monitronics MDL, in which Plaintiffs
19 seek recovery for the very telephone calls at issue here, causes Plaintiffs' classes to fail on
20 superiority grounds as well. Second, while Plaintiffs presented an expert report to establish the
21 numerosity of the DNC Class, they failed to present similar, necessary expert testimony to
22 establish the numerosity of the Cell Phone Class and the Residential Class. Finally, Plaintiff
23 Charvat, who seeks to serve as a class representative for the DNC Class, is an inadequate class
24 representative because he is not a member of the very class he seeks to certify. For all of these
25 additional reasons, Plaintiffs' motion should be denied.

1 **1. PLAINTIFFS' PROPOSED CLASSES FAIL ON SUPERIORITY GROUNDS**

2 Plaintiffs' proposed classes fail because, on these particular facts, the present class action
3 is not the superior method of adjudicating Plaintiffs' claims. Rule 23(b)(3) requires courts to
4 consider the following when evaluating the superiority factor:

- 5 (A) the class members' interests in individually controlling the prosecution or
6 defense of separate actions;
- 7 (B) the extent and nature of any litigation concerning the controversy already
8 begun by or against class members;
- 9 (C) the desirability or undesirability of concentrating the litigation of the claims
10 in the particular forum; and
- 11 (D) the likely difficulties in managing a class action.

12 Here, subsections (B), (C), and (D) weigh against a finding that the present class action
13 is the superior mechanism for resolving the claims of the Plaintiffs' classes. Litigation regarding
14 the same calls at issue here is already pending in the Monitronics MDL. Because the classes and
15 calls at issue here are subsumed within the larger Monitronics MDL, it is not appropriate to
16 concentrate the litigation of the instant claims in this forum. Certification of classes in both
17 actions could lead to inconsistent results as to the same calls or could lead to double recovery
18 by class members.

19 Plaintiff Charvat is cognizant of the types of difficulties presented by parallel
20 proceedings. In the Monitronics MDL, Charvat, along with Lead Counsel in the MDL,
21 previously stated as follows in arguing in favor of transfer in order to avoid the specter of
22 inconsistent rulings:

23 [If] Honeywell is somehow exempted from transfer to the MDL proceedings
24 pending before Judge Irene Keeley in the Northern District of West Virginia, but
25 the Mey/Charvat Claims against Monitronics are transferred, plaintiffs would face
26 the untenable prospect of proving liability for the same telemarketing calls in two
27 different courts. This would create an unacceptable risk of inconsistent rulings and
28 duplication, as well as a remarkably confusing process for resolving claims at trial.
It is exactly these kinds of circumstances that make consolidation desirable and
appropriate.

Ex. 16, *In re Monitronics*, MDL No. 2493 (N.D. W. Va.) (Dkt. 82). Plaintiff Charvat's reasoning is sound. Moreover, the likely difficulties in managing a class action where parallel proceedings involving the same allegations against different defendants are pending weigh against a finding of superiority with respect to Plaintiffs' proposed classes. As to each putative class member, the Court will need to consider whether each call promoted Alarm.com, whether any calls promoted both Alarm.com and other entities at the same time (which could be inconsistent with rulings in the Monitronics MDL), how liability should be apportioned when calls are found to have been made on behalf of multiple parties, and whether each putative class member consented to the calls allegedly made on behalf of one or more entities. Under these circumstances, Plaintiffs' proposed class action here is not the superior method of adjudicating Plaintiffs' claims.

2. PLAINTIFFS HAVE FAILED TO ESTABLISH THE NUMEROSITY OF THE CELL PHONE CLASS AND THE RESIDENTIAL CLASS

While Plaintiffs offer an expert report that purports to identify the size of the DNC Class, in contrast, Plaintiffs submit only a declaration of Plaintiffs' counsel's paralegal, Rachel Hoover, to identify the size of the Cell Phone Class and the Residential Class. Motion, pp. 9-10; Rachel Hoover Declaration ("Hoover Decl."), Dkt. 87, at ¶¶ 11-14. But Ms. Hoover's analysis is improper for the reasons described below and should be stricken.⁴ Moreover, the call records relied upon by Plaintiffs do not reflect calls that meet the class criteria. Plaintiffs have thus failed to establish numerosity for those classes. *See Southwell v. Mortgage Investors Corp. of Ohio*, No. 13-cv-1289, 2014 U.S. Dist. LEXIS 112362, *4-12 (W.D. Wash. Aug. 12, 2014); *Legg v. Voice Media Group, Inc.*, No. 13-cv-62044, 2014 U.S. Dist. LEXIS 61836, *6-10 (S.D. Fla. May 5, 2014).

As an initial matter, class size determinations from telephone records in TCPA cases are the subject of expert testimony; Plaintiffs acknowledge as much by proffering the expert report

⁴ Contemporaneously with this response, Defendants are filing a Motion to Strike Ms. Hoover's report.

1 of Ms. Verkhovskaya in support of their request to certify the DNC Class and by noting that an
2 expert “will be able to identify members of the Residential and Cell Phone Classes . . .” at some
3 time in the future. Motion, p. 20. Having failed, however, to timely submit an expert report to
4 support certification of the Cell Phone Class and the Residential Class, and recognizing that
5 class-related expert discovery is now closed, Plaintiffs have at the last minute submitted the
6 Declaration of Plaintiffs’ counsel’s paralegal, Rachel Hoover, in an attempt to establish
7 numerosity. But Ms. Hoover’s testimony reveals that she: (1) is not an expert, Ex. 17, Rachel
8 Hoover Deposition, p. 13:23-25, 14:1-3; (2) is a paralegal and office manager for Terrell
9 Marshall and does not have the qualifications to perform the analysis noted in her declaration,
10 *Id.* at 6-10 (generally); (3) attempted to perform the same analysis that she understands an
11 expert would have performed, *Id.* at 99:15-25, 100:1-5; (4) has no knowledge about the
12 reliability of the records she used for her analysis (approximately 50% of which she concedes
13 appear to be erroneous) *Id.* at 26:7-18, 28:19-25, 29:1-8, 63:5-25; 64:1-6; and (5) concedes that
14 her report has several mistakes, *Id.* at 89:3-11.

15 Because Ms. Hoover is not an expert, she cannot offer principled reasons, based on
16 education and experience, for utilizing the tools she utilized and performing the tasks she
17 performed to establish class size. Additionally, she is not competent to testify as to industry
18 standards with respect to data sources. *See Sali v. Universal Health Servs. of Rancho Springs,*
19 *Inc.*, 14-cv-985, 2015 U.S. Dist. LEXIS 182159, *30-33 (C.D. Cal. June 3, 2015) (finding a
20 paralegal declaration improper where the paralegal did not have personal knowledge of the
21 accuracy of the data he relied upon, and he offered improper opinion testimony by purporting to
22 extract relevant information from extensive amounts of pay data and analyzing that data to
23 reach conclusions without demonstrating he was qualified to conduct that analysis). Moreover,
24 the data Ms. Hoover relied upon to perform her analysis is on its face unreliable as Ms. Hoover
25 admits *that nearly half of all the call records at issue contained invalid phone numbers.* Ex. 17,
26 Hoover Dep, 63:3-15. For all of these reasons, and consistent with applicable case law, the
27 Court should not consider Ms. Hoover’s declaration for any purpose.
28

1 The *Southwell* decision is particularly compelling on this point. In *Southwell*, the
2 plaintiff attempted to establish the numerosity of his proposed class by reference to one
3 numerosity-related paragraph in his class certification briefing, which was based on the
4 declaration of a purported expert who had no expertise with the TCPA or with do-not-call
5 policies, and who relied upon highly questionable data. *See Southwell*, 2014 U.S. Dist. LEXIS
6 112362 at *5-11. As here, plaintiff attempted to correct this deficiency by offering the
7 declaration of a second expert (as it happens, Anya Verkhovskaya—Plaintiffs’ expert here) who
8 submitted what the court termed an “entirely prospective” declaration describing what she
9 “intended to do with the data provided by Plaintiffs.” *See id.* at *11-12. The court rejected both
10 the initial report and the “prospective” follow-up report and held that plaintiffs failed to
11 establish numerosity. *Id.* The facts here are eerily similar. Plaintiffs here submitted a speculative
12 report by a paralegal who can provide no competent evidence upon which to estimate the size of
13 the putative class and, as in *Southwell*, have attempted to remedy the problem with a
14 prospective statement by a purported expert, Mr. Hansen, who “describes the methodology he
15 would use to identify cell phone numbers from calling records *were he asked to do so.*” Motion,
16 p. 10 (emphasis added). That is improper and, for the reasons discussed in Alarm.com’s
17 accompanying motions, the reports of Ms. Hoover and Mr. Hansen should be stricken.

18 The unreliability of Ms. Hoover’s testimony notwithstanding, Plaintiffs face another
19 fundamental obstacle in identifying their first two proposed classes (the Cell Phone Class and
20 the Residential Class)—the calls they analyzed are not ones that meet the class criteria. The Cell
21 Phone Class is to be comprised of persons who received calls on cell phones using “an
22 automatic telephone dialing system or an artificial or prerecorded voice,” while the Residential
23 Class is to be comprised of persons who received calls on their residential phones using “an
24 artificial or prerecorded voice.” Motion, p. 12. But the Nationwide records Plaintiffs cite for this
25 proposition are not records of calls of that type. Based on the Nationwide declaration Plaintiffs
26 provided in support of their motion to certify, these are records of calls purportedly placed *after*
27 the recipients received prerecorded calls. Joseph Moretti Declaration, Dkt. 89, at ¶ 6(c).

Accordingly, these records do not and cannot, inform the size of a class that received entirely different calls altogether. *Cf. Midtown Valuation, Inc. v. Capital Alliance Grp.*, No. 14-cv-1586, 2015 U.S. Dist. LEXIS 117191, *19-26 (E.D.N.Y. Aug. 11, 2015) *adopted by* 2015 U.S. Dist. LEXIS 117164 (E.D.N.Y. Sept. 2, 2015)(denying certification on numerosity grounds where plaintiff provided evidence of calls to a defendant’s number *after* faxes were purportedly sent instead of evidence of persons who received unsolicited faxes); *Legg*, 2014 U.S. Dist. LEXIS 61836 at *6-10 (finding plaintiff “provided no competent evidence upon which even to estimate the size of the Proposed Class” where the only evidence of numerosity was an expert report, which was based on speculation and drew conclusions regarding a group of cellular subscribers that was not coextensive with the proposed class).⁵

For the above reasons, Plaintiffs have failed to provide the Court with evidence that the Cell Phone Class and the Residential Class are sufficiently numerous.

3. PLAINTIFF CHARVAT IS AN INADEQUATE REPRESENTATIVE OF THE NATIONAL DO-NOT-CALL CLASS

Unlike the Cell Phone Class and the Residential Class, for which Plaintiffs submitted no supporting expert report, Plaintiffs tendered the report of Anya Verkhovskaya to establish the numerosity of the DNC Class. Motion, p. 8. For the reasons discussed in Alarm.com’s accompanying Motion to Strike, that report should be disregarded. But the flaws in Ms. Verkhovskaya’s analysis notwithstanding, the DNC Class cannot be certified for an additional reason—Plaintiff Charvat, the sole representative of the DNC Class, is not a member of the class he seeks to represent because he did not receive calls that promoted Alarm.com goods and services.

Plaintiff Charvat received a series of phone calls from Alliance (a number of which were placed after Charvat represented to Alliance that he was interested in a home security system,

⁵ The court struck plaintiff’s expert’s testimony but noted that plaintiff would have failed to establish numerosity even if the court had accepted the testimony. *See Legg*, 2014 U.S. Dist. LEXIS 61836 at *7-10

even going so far as to request a home visit). *See* Ex. 5, Charvat Dep., pp. 176:1-25, 177:1-25, 178:1-25. But Alarm.com was not mentioned until the sixth call Charvat received, and that was after Charvat asked about Alarm.com specifically. *Id.* at pp. 176:13-25, 177:1-3. While a number of other companies were mentioned by Alliance during the calls, Alarm.com was only mentioned in response to a specific inquiry. Accordingly, Mr. Charvat did not receive calls that promoted Alarm.com. Since that is a specific requirement of membership in the DNC Class, Mr. Charvat is not a member of this class and cannot serve as its representative. *See Falcon*, 457 U.S. at 156, 102 S. Ct. at 2370; *Donaca v. Dish Network, LLC*, 303 F.R.D. 390, 396-397 (D. Colo. 2014)(denying class certification in a TCPA case where plaintiff did not receive calls from the dealers named in the class definition).

VI. CONCLUSION

Alarm.com develops and provides a discrete component of a fully-integrated security system—technology that enables certain wireless communication and automation functions for interactive security systems. Alarm.com sells that technology to thousands of Dealers who ultimately sell complete, integrated security systems (as well as other products that do not contain Alarm.com components) to end users. Plaintiffs here are attempting to hold Alarm.com liable for the conduct of one of the 6,000+ Dealers that sells systems incorporating Alarm.com’s technology. But while it is easy to identify the calls Alliance made, there is simply no way, on a class-wide basis, to isolate which of those calls (if any) give rise to liability for Alarm.com, and if so, what the extent of Alarm.com’s liability should be. To make that determination, the Court would need to identify the circumstances surrounding and content of each particular call, which would necessarily cause this matter to devolve into a series of mini-trials, rendering the issue uniquely unsuitable for class treatment.

While the predominance of the above-discussed individual issues is in and of itself sufficient to defeat certification, it is not the only basis upon which Plaintiffs’ motion should be denied. The existence of parallel litigation involving the same telephone calls causes the proposed classes to fail on superiority grounds. Moreover, Plaintiffs have failed to establish

1 numerosity for the Cell Phone Class and the Residential Class, and the DNC Class lacks an
2 adequate class representative. For all of the foregoing reasons, Alarm.com respectfully requests
3 that Plaintiffs' Motion be denied.

4 Dated: March 28, 2017

Respectfully submitted,

5 JASZCZUK P.C.

6 By: /s/ Martin W. Jaszczuk
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CERTIFICATE OF SERVICE

I, Martin W. Jaszczuk, hereby certify that on March 28, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties registered to receive electronic service in the above-captioned action.

Dated: March 28, 2017

Respectfully submitted,

JASZCZUK P.C.

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